Statement on today's FERC actions

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Today we return to a major priority for the Commission over the past two years – setting matters right in the aftermath of the 2000/2001 Western energy market problems. We began to resolve many of these issues back in March; they represent complex, multi-faceted and novel matters of first impression. This has required a very careful review of the facts and several voluminous records, as well as a thorough deliberation of the issues.

We need to put these issues behind us and provide the regulatory certainty our competitive energy markets so clearly require. But these are issues where views and interests differ widely and compromise is rare, so today we act to resolve these conflicts while providing the due process market participants deserve. We must decide these issues carefully and fairly, in a manner that satisfies judicial review.

The issues before us today will address the main issues pending from the March 2003 Staff Task Force Final Report on the Western Market Investigation. We have carefully examined that report as well as the evidence and arguments offered by all sides in the "100 Days Discovery" process we initiated last November. We also take up a number of requests to reform long term contracts in various parts of the country. These remarks will give you an overview of what we're going to cover today.

First, in Item E-1 we consider an order to address the market misbehavior of Enron Corp. By revoking the company's authority to sell electricity at market-based rates, and similarly to sell natural gas under a blanket certificate, we send a clear signal that competitive markets must work in the interest of customers and the public interest. This is the first time the Commission has imposed the so-called "death penalty."

Second, the March 26 staff investigation report recommended certain actions in response to the Enron strategies and other questionable market behaviors. A study by the California ISO identified a number of market participants as

having engaged in these strategies and entering into business relationships with Enron that raise concerns. Additionally, a number of parties in the "100 Day Discovery" process identified many of the same concerns, while raising other matters. The law allows the Commission to order disgorgement of profits in these instances, provided they represent a violation of a then-existing tariff.

In Item E-3 we consider specific market practices that violated the Market Monitoring and Information Protocol provisions of the tariffs of the California Independent System Operator and the California Power Exchange. Based on the Staff's, the ISO's and the 100 Days Evidence parties' information, we consider formally initiating enforcement proceedings for 60 companies regarding apparent violations of the California Independent System Operator and California Power Exchange tariff provisions prohibiting "gaming" and "anomalous market behavior". This evidence will be considered by a FERC judge in a formal hearing, with the base remedy being disgorgement of the unjust profits associated with any proven violations.

We also clarify which market schemes constitute prohibited gaming and others that represent legitimate arbitrage or will otherwise not be prosecuted. Our definition of prohibited gaming behaviors is driven largely by the use of false information and deception to make a profit; not every behavior identified in the Enron memos was wrong. For example, selling power outside California to receive an uncapped price is legitimate. Furthermore, we recognize that transactions may have the appearance of gaming but may have occurred for solid, non-manipulative purposes, so we offer some direction to the parties and the Judge for how to winnow thoroughly but expeditiously through the transactions.

The first show cause order, discussed above, addresses gaming behavior practiced by individual companies. But the Staff Task Force Final Report also explained that Enron and two other companies apparently practiced gaming and market manipulation by working in concert with other utilities in the West. In the second show cause order, Item E-4, we will consider formal enforcement hearings in which Enron and the other two alleged partnership organizers and their business partners, will be asked to submit evidence and proceed to hearings on the issue of jointly engaging in these gaming practices that violated Commission regulations and relevant tariffs to the disadvantage of customers and the marketplace. As with the individual gaming practices, the base penalty for these issues will be disgorgement of the unjust profits from the tariff violations.

The Staff Task Force Final Report also addressed the issue of economic withholding. In Item E-5, we will consider an order accepting the Staff's recommended level of $250/MW as the threshold of review for anomalous bidding as defined in the MMIP in the tariffs. It publicly directs the Office of Market Oversight and Investigations to continue its investigation of bidding patterns in the ISO and PX markets to determine whether they represent economic withholding in violation of the tariffs' anti-gaming provisions. OMOI will report back to us before year-end regarding those responsible for economic withholding, and the amount of their profits potentially subject to disgorgement. This is perhaps our most difficult issue, but we must and will conclude our review of economic withholding soon.

This will affect sales from May through October 2, 2000, which marked the beginning of the applicable refund period in our California refund proceeding. That refund proceeding is on a different track here and will proceed as we have directed in our March order. We have essentially bifurcated the process. For the October 2, 2000, through June 21, 2001, refund period, the soon-to-be-fully-determined market mitigated clearing price will determine refunds. For the prior period, beginning in May 2000, companies will be subject to disgorgement of unjust profits associated with tariff violations.

The Staff Task Force Final Report and the "100 Days Evidence" also alleged that some generators may have engaged in physical withholding. Today, we will receive a brief public update on staff's ongoing investigation of these matters.

What I have just described are backward-looking, remedial issues concerning past market behavior. In Items E-54 and G-24, we consider responses to the Staff Task Force Report's recommendations to add clearer market rules and some bite to electric our market-based rate authorizations and our gas marketing certificates. In those items today we have proposed rules which will add new behavioral constraints and reporting requirements to electric market-based rate authorizations and natural gas blanket certificates. We also touch upon solutions to some of the index and reporting issues we heard about yesterday at the well-focused Price Reporting Issues conference with the CFTC. We look forward to comments on these proposals.

Also looking forward, we consider, in M-1 and M-2, a Final Rule on Cash Management practices (the subject of a staff audit last summer), and a new NOPR on Regulated Company reporting requirements. These actions, our

first following the Sarbanes-Oxley Act of last year, are intended to enhance transparency and public disclosure to our regulated entities. This serves not only the interests of the Commission in our duties, but also the interests of customers, state regulators, investors and counterparties.

Finally, today we consider orders in a number of different cases regarding some aspect of power contract reformation. Acting on the evidence and analysis compiled by our Administrative Law Judges in four Western cases, we find that the records do not support requests to modify or abrogate contracts entered into during the Western energy crisis. We also act today on a contract dispute arising in Connecticut.

I acknowledge that we do not rule with unanimity among the Commissioners on these contracts. One of the challenges of these orders has been that we each have strongly held and different approaches to the standard of review and the weighing of the evidence in these various cases. These are difficult, complex issues as we will discuss later on today. But while we may not agree on every conclusion, we do continue to work on these hard issues collegially with a mindful eye toward the inevitable court reviews of these decisions.

So today, on our second anniversary at FERC, Nora, and your tenth, Bill, we should be able to move significantly down the road on the numerous Western Dockets issues. After today's meeting we will have the bulk of the decision making on the California clean-up behind us. Going forward, it is absolutely imperative that we have clear market rules in place to assure that this sort of severe dysfunction can never again victimize electricity customers. I look forward to our continued dialogue on the road around the country with market participants, RTO and ISO staff and state officials to accelerate the development of fair and robust power markets that bring benefits to customers, not pain.

In closing, I want to sincerely thank all the staff whose hard work, long hours and dedication made today's actions possible, a full month earlier than I had promised.

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